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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 849

ELECTRO METALLURGICAL SALES CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 16–21) has not yet been reported. The opinion of the district court (Pet. 11–15) is reported in 132 F. Supp. 388.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1956. The time for filing a petition for a writ of certiorari was extended by Mr. Justice Clark, on March 12, 1956, to April 11, 1956. The petition for a writ of certiorari

was filed on April 11, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether under New York law pending criminal proceedings survive the merger of a corporate defendant.

STATUTES INVOLVED

The pertinent provisions of Sections 1, 2, and 8 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U. S. C. 1, 2, and 7, commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.
>
> SEC. 8. The word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by

> the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Pertinent provisions of the New York Stock Corporation Law and General Corporation Law are set forth in the petition, pp. 23–25.

STATEMENT

This petition and the Government's petition in No. 848, this Term, seek review of different parts of the same judgment of the court of appeals. The facts are set forth in the petition in No. 848 (pp. 6–8), and we shall not repeat them in detail here. In brief, they are that two corporations and three wholly-owned subsidiaries of one of them were charged by information with violating Sections 1 and 2 of the Sherman Act; that, following the filing of the information, one of the subsidiaries, a West Virginia corporation, was dissolved, pursuant to the laws of that state, and the other two, a Delaware and a New York corporation, respectively, were merged with their parent; that, upon the parent's motion, the district court dismissed the information as to the three subsidiaries, on the ground that the law of the state of incorporation determines whether merger or dissolution abates a Sherman Act criminal proceeding, and that under the laws of the respective states of incor-

poration a criminal action does not survive merger or dissolution.

On appeal, the Court of Appeals for the Tenth Circuit affirmed the dismissal as to the Delaware and West Virginia corporations but reversed the dismissal as to the New York corporation. The court held that the question whether a criminal action abates upon merger or dissolution was to be determined by state law, and it concluded that under New York law a criminal action survives dissolution, but that under Delaware and West Virginia law it does not.

In No. 848 the Government is seeking review of that portion of the judgment below which affirmed the dismissal of the information as to the West Virginia and Delaware corporations. Petitioner here seeks review of that part of the judgment which reversed the dismissal as to the New York corporation.

ARGUMENT

1. The petition presents only a narrow question of state law: whether, under the provisions of the pertinent New York statutes, a pending criminal proceeding against a New York corporation is abated by the merger of that corporation. Concededly, no federal question, important or otherwise, is presented; and no conflict of decisions is asserted. This case therefore does not call for further review by this Court, particularly since,

as we show *infra*, pp. 6–8, the court of appeals' interpretation of New York law is clearly correct.

The fact that in No. 848 the Government is seeking review of other portions of the judgment below is not, as petitioner suggests (Pet. 4), an adequate reason for granting review in this case. In No. 848 the Government has urged, as the primary ground for review, the existence of an important federal question;[1] in the instant case, the sole basis for the review sought is an alleged error by the court of appeals in interpreting state law. The Government also urges, as an additional ground for review in No. 848, that the court of appeals' interpretation of Delaware law conflicts with the interpretation of that law by another circuit[2] and has no support in state decisions. The interpretation of New York law which petitioner here challenges is not in conflict with that of any other circuit, and it is in accord with a well-reasoned and persuasive opinion by a

[1] The federal question is whether a merged or dissolved corporation which, under the law of the state of incorporation, continues to exist for many purposes (even if not for purposes of state criminal prosecution), is an "existing" corporation under Section 8 of the Sherman Act and therefore remains subject to criminal prosecution under that Act. See petition, No. 848, pp. 8–11.

[2] The primary holding of the court of appeals as to which there is a conflict is that under Delaware law criminal proceedings do not survive the merger or dissolution of corporate defendants. See petition, No. 848, pp. 11–13. The court reached the same conclusion as to West Virginia law only because of the latter's similarity to Delaware law.

federal district judge sitting in New York (see *infra*, pp. 7–8). Furthermore, in No. 848 the Court would reach the state law question only if it decided the federal question adversely to the Government, since it is conceded that dissolved corporations do continue in existence for many purposes under the laws of Delaware and West Virginia. The two petitions, therefore, rest on entirely different bases.

2. The court of appeals correctly held that under New York law a merged or dissolved corporation continues subject to pending criminal prosecution. The New York corporate dissolution statute (New York Stock Corporation Law, § 90) provides that "no action or proceeding then pending before any court or tribunal in which any constituent corporation is a party * * * shall abate or be discontinued by reason of such consolidation, but may be prosecuted to final judgment, as though no consolidation had been entered into * * *." Section 11–a of the New York General Construction Law, which by Section 110 is made "applicable to every statute" except where it appears that a different meaning or application is intended, provides: " 'Action' when applied to judicial proceedings, signifies an ordinary prosecution in a court of justice, by a party against another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Actions are of two kinds: civil and

criminal." We submit that when these two sections are read together, they manifest a clear legislative intent that pending criminal proceedings are not to be abated by the dissolution of corporate defendants.[2]

New York judicial authority supports this view. In *People* v. *Bankers' Capital Corp.*, 137 Misc. 293, 241 N. Y. S. 693, it was held that a quasicriminal action to recover a fine or penalty could be maintained against a foreign corporation which previously had surrendered its certificate of authority to do business in New York State. Cf. *People* v. *Elliott*, 172 N. Y. 146, holding that "action" includes both criminal and civil actions under a statute authorizing the reading of testimony of deceased persons at a second trial. Finally, in *United States* v. *Cigarette Merchandisers Association*, 136 F. Supp. 214 (S. D. N. Y.), appeal pending *sub. nom. The Rowe Corporation* v. *United States*, C. A. 2, No. 23,948, Judge Weinfeld held that under New York law a pending criminal proceeding is not abated by

[2] Petitioner argues (Pet. 5–7) that since the New York merger statute provides only that the surviving corporation shall assume all the liabilities and obligations of the merged company, and does not provide, as does the consolidation statute, that pending actions or proceedings shall not be abated, the merger statute does not provide for survival of criminal proceedings. But the provision of the merger statute upon which petitioner relies relates to the liabilities of the surviving corporation; it does not purport to deal with the extent to which the merged corporation continues to exist after the merger.

the merger and dissolution of a corporate defendant. This well-reasoned opinion by a New York federal judge carefully considers the pertinent New York statutes and judicial decisions, and we submit that the court of appeals in the instant case properly held (Pet. 21) that it "correctly analyzes the New York law."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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